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No. _____

In The

Supreme Court of the United States

October Term, 1990

EMANUEL M. COMORA, D.M.D. and
MARGARET B. COMORA,

Petitioners,

versus

IRVIN and NANCY RADELL and
DAVID and MARY RADELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Whether the Ninth Circuit's affirmance of the bankruptcy court's lifting of automatic stay without determination of dischargeability under 11 U.S.C. §523 of unsecured state judgment violated the Bankruptcy Act.

II

Did the Ninth Circuit's erroneous characterizing of two real properties, assets of the bankruptcy estate, as "jointly owned" with bankrupt and unsecured creditor, deprive bankrupts of Due Process?

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DAVID and MARY RADELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

The petitioners, EMANUEL M. COMORA, D.M.D. and MARGARET B. COMORA, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Ninth Circuit, rendered and entered on April 24, 1990; petition for rehearing denied on July 25, 1990.

JURISDICTION

The Petition for rehearing was denied and suggestion for rehearing en banc was rejected on July 25, 1990.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals, Ninth Circuit, is unreported and is reprinted in the appendix at App. 1-5.

The order denying petition for rehearing and en banc is unreported and is reprinted in the appendix at App. 6-7.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Fifth Amendment, Due Process Clause

U.S.C.A. Constitution, Art. 6, cl. 2, supremacy clause

U.S.C.A. Constitution, Art. I, §8, cl. 4, providing that Congress may establish uniform laws on subject of bankruptcy

11 U.S.C.A. §727(a) mandates a discharge for every individual Chapter 7 debtor unless one of the exceptions contained in 11 U.S.C.A. §727 applies

STATEMENT OF THE CASE

On February 23, 1987, Petitioner MARGARET COMORA filed a Chapter 11 Bankruptcy Petition and for Turnover of Funds (*11 USC* 543) held by the state court receiver. A certified copy of the Petition and Notice of Automatic Stay was served on the state court, the state court receiver, the RADELLS, and their counsel prior to the hearing February 25, 1987 in the state trial court.

Respondents, the RADELLS, subsequently filed an ex parte application in the bankruptcy court to lift the automatic stay, which was opposed by MARGARET. At the hearing on the application in the bankruptcy court held on March 9, 1987, Bankruptcy Judge Lasarow summarily granted the application permitting the RADELLS to execute on an unsecured state money judgment. (The order lifting the stay was not made retroactive.) No findings of fact or conclusions of law were rendered although requested. Judge Lasarow also denied MARGARET'S request for a stay pending appeal. On March 18, 1987, MARGARET filed an emergency application to the Bankruptcy Appellate Panel for a stay which was denied on April 17, 1987. On April 17, 1987, MARGARET appealed to the BAP from the order lifting the stay.

On March 20, 1987, five days prior to the Marshal's execution sale of Lexington, which was scheduled for March 25, 1987, Petitioner EMANUEL COMORA filed a Chapter 7 Petition in Bankruptcy and an Application for Turnover of Funds (*11 USC* 543) held by the state court receiver. The case was referred to Judge Lasarow. Gary Plotkin was appointed U.S. Trustee on that same day, March 20th.

Again, the RADELLS filed an ex parte application to lift the automatic stay. The RADELLS urged Judge Lasarow, despite U.S. Trustee Plotkin's strenuous objections and request for a postponement, to lift the automatic stay, citing the fact that they had a previously obtained buyer for Lexington standing by on that same day, March 25th, who was informed of the bankruptcy petitions of the COMORAS.

Judge Lasarow lifted the stay, effective immediately. (The order on the lifting of the stay was not made retroactive.) No findings of fact or conclusions of law were rendered, although requested. At 1:00 p.m. on March 25, 1987, Lexington was sold by the Marshal for the sum of $110,000.00 to Frank Howard ("HOWARD"), a Glendale developer who owned property adjacent to Lexington and who was the only person present at the sale. A Marshal's deed to HOWARD was recorded on April 9, 1987.

On March 25, 1987, EMANUEL requested a stay pending appeal, which Judge Lasarow denied. On May 29, 1987, EMANUEL'S motion for emergency stay to the BAP was denied on the same day EMANUEL filed his notice of appeal to the BAP.

On April 8, 1987, in the California Court of Appeal, Second Appellate District, the COMORAS filed a separate appeal from the execution by the RADELLS, the turnover of Oakhurst and from turnover of funds held by the Receiver to the RADELLS. No determination has been made on these issues. The claims are assets of COMORA'S Estate in bankruptcy.

On May 11, 1987, HOWARD filed a separate ex parte application to Judge Lasarow to lift the automatic stay as to EMANUEL only. The order lifting the stay in that adversary action is not final.

On May 15, 1987, Mr. Plotkin withdrew as U.S. Trustee and Dennis McGoldrick was appointed successor U.S. Trustee.

On May 9, 1987, in furtherance of the execution, the State Court Receiver switched hats to Referee and executed a deed to the RADELLS. The receiver turned Oakhurst and the funds of approximately $400,000 in his possession over to the RADELLS, who, to operate Oakhurst, had formed a general partnership of their respective trusts. The Radells continue to operate Oakhurst, collecting the rents and profits and residing in the building rent-free. The receiver/*"referee"* sought and was discharged on December 20, 1987. This deception enabled the RADELLS to subsequently place loans against Oakhurst on June 30, 1987 (2.2 million dollars) and on February 2, 1988 (3.2 million dollars) for a total of at least $5,400,000.00 according to recorded documents. No accounting has ever been rendered.

On June 5, 1987, the RADELLS continued to execute on their unsecured money judgment and evicted the COMORAS and their daughters from their home in Oakhurst. HOWARD evicted EMANUEL from his dental office in Lexington although his application to lift the automatic stay as to EMANUEL only was and is still pending.

On July 2, 1987, in the bankruptcy court, the RADELLS filed an objection to the discharge of

EMANUEL. This action is still pending; it has been continued from time to time by stipulation. On September 24, 1987, the RADELLS filed a similar objection to the discharge of MARGARET. This action is also still pending; it has been continued from time to time by stipulation.

On September 8, 1987, bankruptcy counsel for the COMORAS made separate motions to dismiss each of their bankruptcy cases. The RADELLS and HOWARD opposed these motions and on that date Lasarow denied the motions.

On September 8, 1987, with opposition by the COMORAS, the RADELLS made the following three motions before Judge Lasarow which were granted:

1. To convert MARGARET'S petition to a Chapter 7;

2. To consolidate EMANUEL'S and MARGARET'S cases;

3. To have both cases (EMANUEL'S and MARGARET'S) jointly administered by U.S. Trustee Dennis McGoldrick.

THE APPEAL TO THE BANKRUPTCY APPELLATE PANEL FROM JUDGE LASAROW'S ORDERS LIFTING THE STAYS

In the appeal to the BAP from the orders of Judge Lasarow lifting both stays, after their opening brief was filed on May 22, 1987, but before the appellees' brief was filed, the RADELLS made a motion to the BAP, on August 5, 1987, to dismiss the COMORAS' appeal on the grounds that since the COMORAS had failed to obtain stays, their appeals were moot.

On September 23, 1987, the BAP denied the RADELLS' motion to dismiss, citing *In re Sun Valley,* CCA 9th (1988) 823 F2d 1373. On August 9, 1988, after six months had passed, the BAP dismissed the appeal as being moot, citing *In Re Anouli-Kona Land,* CCA 9th (1988) 846 F2d 1170, 1171. The COMORAS asked the BAP for a reconsideration which was denied on January 17, 1989. The Ninth Circuit affirmed the BAP on April 24, 1990.

REASONS COMPELLING ALLOWANCE OF THE WRIT

1. Both the Bankruptcy Court and the Bankruptcy Appellate Panel, Ninth Circuit, treated the pre-petition unsecured judgment creditors, respondents here, as secured creditors thereby authorizing a lift of the bankruptcy stay with concomitant execution on petitioners' apartment house and dental office which in turn mooted the appeal. Such usurpation of the will of Congress, i.e., a limitation of the effect of a Chapter 7 (later converted to Chapter 11) discharge in bankruptcy requires an exercise of the supervisory power of this Court because the courts below have disregarded heretofore strictly enforced procedures and substantive law relating to dischargeability of an unsecured debt reduced to judgment in a state court based on a contractual dispute between petitioners and respondents. There was no determination whatever in the courts below to avoid the discharge of this debt which is controlled by *11 USC § 523* of the Code. The Bankruptcy Court capriciously lifted the stay, permitting the RADELLS to execute on two parcels of the bankrupts' real property. The Bankruptcy Appellate Panel thereafter

declared the appeal was moot. This is not the law. The Ninth Circuit affirmed on mistaken record.

2. The courts below have effectively circumvented *11 USC § 727(a)* which mandates a discharge for every individual in Chapter 7 or 11 and have done so without a determination whether one of the exceptions contained in *11 USC § 727 applies.*

ARGUMENT

Among the granted powers to courts of bankruptcy under the Bankruptcy Act are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part of claims previously allowed; and the entering of such judgments as may be necessary for the enforcement of provisions of the Act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. *United States Fidelity & Guaranty Co. v Bray,* 225 U.S. 205, 217, 32 S. Ct. 620, 625, 56 L. Ed. 1055.

Hence, this Court has held that a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. *Lesser v Gray,* 236 U.S. 70, 35 S. Ct. 227, 59 L. Ed. 471. *And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature so far as provability is concerned [Boynton v Ball,* 121 U.S. 457, 7 S. Ct. 981, 30 L. Ed. 985], so the court may look behind the judgment to determine the

essential nature of the liability for purposes of proof and allowance. *Wetmore v Markoe*, 196 U.S. 68, 25 S. Ct. 172, 49 L. Ed. 390.

Here, the bankruptcy court abdicated its role and recast respondents' status as general unsecured state judgment creditors into secured creditors based on false statements in respondents' motion to lift the statutory stay and without due process. Such ex parte determination, based on court briefs, altered the code scheme embraced in *11 USCA § 507(a)*. The Code scheme should be strictly construed and supersedes state law. *Trustees of Amalgamated Ins. Fund v McFarlin's, Inc.*, (CA-2 NY) 789 F.2d 98.

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950). The root requirement of the Due Process Clause is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971) (emphasis in original); see *Bell v Burson*, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591, 29 L. Ed. 2d 90 (1971). This principle requires some type of a hearing.

Thus, however "rational" the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment. *United States v Security Industrial Bank*, (1982) 459 U.S. 70, 75, 103 S. Ct 407, 410, 74 L. Ed. 2d 235.

As this Court stated in *Norwest Bank Worthington v Ahlers* (1988) 485 U.S. 197, 99 L. Ed. 2d 169, 108 S. Ct. 963, "Whatever equitable powers remain in bankruptcy courts must and can only be exercised within confines of the Bankruptcy Code."

Thereafter, the Bankruptcy Appellate Panel dismissed the petitioners' appeal as moot because the petitioners did not obtain a stay of the lifting order pending appeal and the respondents sold two real properties which were assets of the bankruptcy estate.

The Ninth Circuit opinion, p. 2, stands the case on its head in its first paragraph:

> "Emanuel M. and Margaret B. Comora appeal the Bankruptcy Appellate Panel's dismissal of their appeal as moot. The Radells obtained a judgment against the Comoras in a California state court action. The Comoras filed, separately, for bankruptcy, but on the Radell's motion, the bankruptcy court lifted the automatic stay. The Comoras appealed the lifting of the stay but did not obtain a stay of the lifting order pending appeal. *The Radells proceeding to sell two real properties they jointly owned with the Comoras and applied the proceeds to the judgment they had against the Comoras.*" (Emphasis Added)

The remainder of the three and one-half page unpublished opinion then proceeds to mention "redemption rights" in the bankruptcy estate's property and recasts the preferential treatment accorded the RADELLS as unsecured creditors as "the sale of *collateral* following the removal of the automatic stay renders the appeal moot" (Opinion, p. 2, par. 3).

Apart from the plain error in assuming that the RADELLS "jointly owned two real properties with the COMORAS," the contours of res judicata are somewhat different for bankruptcy courts than they are for other courts because tasks which have been delegated to the former by Congress may not be interfered with by the decisions of other courts. See e.g., *Pepper v Litton*, 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939) (state court judgment as to the validity of a claim does not preclude its equitable subordination in a bankruptcy proceeding) and *Brown v Felsen*, 442 U.S. 127, 99 S. Ct. 2206, 60 L. Ed. 2d 767 (1979) (whether a claim against the debtor is dischargeable in bankruptcy may not be preluded by another court's judgment). These cases are grounded on the carrying out of Congress's mandate.

See also *Restatement (Second) of Judgments § 26(1)(d)* (res judicata does not apply when "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory . . . scheme"), 86.

Moreover, the entire record, not just judgment, of state proceedings established that liability was one for *damages caused by breach of contract and not a secured transaction*. Without a determination in the bankruptcy court, both the BAP and Ninth Circuit opinions are hopelessly flawed.

This case is ripe for an exercise of the Court's supervisory power over federal courts.

Selective payment of pre-petition unsecured debt, if tolerated, would negate the fundamental principle of equality of treatment among similarly situated creditors.

CONCLUSION

The judgment below should be vacated.

Respectfully submitted,

EMANUEL M. COMORA, D.M.D.

MARGARET B. COMORA

Petitioners Pro Se

APPENDIX

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1. Ninth Circuit Memorandum of Opinion, No. 89-55093, 4/24/90..... App. 1

2. Ninth Circuit, Petition For Rehearing Denied and Suggestion For Rehearing en banc rejected, 7/25/90.....App. 6

APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE EMANUEL M. COMORA, D.M.D. Debtor	
IN RE MARGARET B. COMORA Debtor	No. 89-55093 BAP Nos. CC 87-1307-VMoJ CC 87-1379-VMoJ
EMANUEL M. COMORA, D.M.D. and MARGARET B. COMORA, Appellants v. IRVIN and NANCY RADELL and DAVID and MARY RADELL Appellees.	RECEIVED APR 30 1990 B. L. SILVERMAN MEMORANDUM* FILED APR 24 1990

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the Bankruptcy Appellate Panel of the United States Court of Appeals for the Ninth Circuit Jones, Mooreman, and Volinn, Judges, presiding

Argued and Submitted
April 13, 1990 – Pasadena, California

BEFORE: GOODWIN, Chief Judge, TANG, Circuit Judge, and MARQUEZ, District Judge.**

Emanuel M. and Margaret B. Comora appeal the Bankruptcy Appellate Panel's dismissal of their appeal as moot. The Radells obtained a judgment against the Comoras in a California state court action. The Comoras filed, separately, for bankruptcy, but on the Radells' motion, the bankruptcy court lifted the automatic stay. The Comoras appealed the lifting of the stay but did not obtain a stay of the lifting order pending appeal. The Radells proceeded to sell two real properties they jointly owned with the Comoras and applied the proceeds to the judgment they had against the Comoras. Because the Comoras had not asserted that they had a right of redemption in the properties, the Bankruptcy Appellate Panel found the appeal moot.

The Comoras now argue that they have a right of redemption in the properties because they are still in the process of appealing the original state court judgment and because, they contend, they may redeem their properties if they file an action within six months of the date the California Supreme Court rules. We find no merit in this argument.

** Hon. Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

Generally, the sale of collateral following the removal of the automatic stay renders the appeal moot. *See In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988); *In re Suchy*, 786 F.2d 900, 902 (9th Cir. 1985); *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1423-24 (9th Cir. 1985). There is a limited exception to the general rule where the buyer is a party to the bankruptcy proceedings and the debtor-property owner retains a right of redemption. *See Onouli-Kona Land Co.*, 846 F.2d at 1172-73; *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373, 1375 (9th Cir. 1987); *In re Worcester*, 811 F.2d 1224, 1228 (9th Cir. 1987).

The Comoras reason that their case is distinguishable from *Onouli-Kona Land Co.*, which found a bankruptcy appeal moot and noted that the debtor property owners had no right of redemption under Hawaii law. *See id.* at 1173. They argue that they have redemption rights under California law. *See* Cal. Civ. Proc. Code § 701.680(b), (c). We disagree.

Subsection 701.680(b) entitles a party to money damages in the event a judgment is reversed on appeal.[1] It

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[1] Section 701.680 states:

> (a) Except as provided in paragraph (1) of subdivision (c), a sale of property pursuant to this article is absolute and may not be set aside for any reason.
>
> (b) If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment.

(Continued on following page)

does not provide for redemption of the property at issue. *See* Cal. Civ. Proc. Code § 701.680(b). Subsection (c) does provide for some redemption rights in the event of sale irregularities that a party contests within six months of the sale. *See* Cal. Civ. Proc. Code § 701.680(c). But the Comoras do not argue either that there were irregularities

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(Continued from previous page)

(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason:

(1) The judgment debtor, or the judgment debtor's successor in interest, may commence an action within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor. Subject to paragraph (2), if the sale is set aside, the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the judgment as so revived as if the sale had not been made.

(2) the judgment debtor, or the judgment debtor's successor in interest, may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. If damages are recovered against the levying officer, they shall be applied to the judgment to the extent the judgment is not satisfied.

(d) For the purpose of subdivision (c), the purchaser of the property at the sale is not a successor in interest.

Cal. Civ. Proc. Code § 701.680.

in the sale[2] or that they contested the sale within the statutorily prescribed period. The Comoras have not, therefore, established the subject-to-redemption exception to the mootness rule.[3]

AFFIRMED.

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[2] The Comoras in the reply brief may be arguing an irregularity by contending that their interest should have been sold as personal rather than real property because they owned as partners. We need not address a new issue raised for the first time on appeal in a reply brief. Moreover, the Comoras do not contend they challenged the irregularity within the six-month period the statute prescribes.

[3] If the Comoras suggest that the mootness rule does not apply in a state whose laws recognize any redemption rights, we reject the suggestion.

APPENDIX 2

IN RE EMANUEL M. COMORA, D.M.D. Debtor	No. 89-55093 BAP No. CC 87-1307-VMoJ Bankr. No. LA 87-03231-WL Adver. No. M7 01452-WL [Chapter 7]
IN RE MARGARET B. COMORA Debtor	
EMANUEL M. COMORA, D.M.D. and MARGARET B. COMORA, Respondents/Appellants v. IRVIN and NANCY RADELL and DAVID and MARY RADELL Movants/Appellees.	CONSOLIDATED WITH BAP No. CC 87-1379 Bankr. No. LA 87-05370-WL Adver. No. M7 92963-WL [Chapter 11] ORDER DENYING PETITION FOR REHEARING & EN BANC (Filed Jul 25 1990)

BEFORE: GOODWIN, Chief Judge, TANG, Circuit Judge, and MARQUEZ, District Judge.*

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has

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* Honorable Alfred C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.